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No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA, APPELLANT

v.

OREGON STATE MEDICAL SOCIETY ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

APPENDIX TO BRIEF FOR THE UNITED STATES

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This appendix relates to the individual appellees. It contains an outline of the evidence showing the participation of each individual appellee in the conspiracy, both as an official of one or more of the organization appellees, and as an individual. No attempt has been made to present a complete picture of each individual appellee's participation in the conspiracy. To do so would require too protracted a discussion. All that has been done is to set forth a sufficient number of illustrative instances to demonstrate that each of the doctors named as defendants by the Government, here discussed in alphabetical order, has violated the Sherman Act.

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1. *Baum*

Baum has been one of a dozen members of the State Society who were most influential in formulating its policies respecting prepaid medical care and hospital associations (R. 1303).

Baum was president of the State Society from September 1941 to April 1942 (R. 1302), and prior to that had been third, second, and first vice president, respectively, in 1936, 1937, and 1938 (Gov. Exs. 1949, R. 5932; 280, R. 2890; 279, R. 2860). He was a member of the State Society Council from 1936 to 1942 (when he entered military service, R. 1302) (Gov. Exs. 280, R. 2890; 302, R. 3027; 332, R. 3110; 342, R. 3156; 343, R. 3162; 346, R. 3175; R. 1302). As a member of the Council he attended meetings at which the Council took the following significant actions:

(1) Sustained the action of the Council of the Multnomah County Society in expelling two doctors because of their contract practice with Prudential Hospital Association (Gov. Ex. 1949, R. 5932; R. 1300–1301) (1936).

(2) Approved the substance of a proposed resolution by the Jackson County Medical Society that its members would boycott the hospital associations (Gov. Exs. 316, R. 3063–3064; 951, R. 4331–4332) (1937).

(3) Adopted a resolution that the Council do not approve the plan of any hospital association not owned and controlled by physicians who were

members of their local and of the State Society (Gov. Ex. 350, R. 3183) (1940).

Since 1945, Baum has attended a number of Council meetings (Gov. Exs. 369–A, R. 3232; 371, R. 3236; 372, R. 3242; 378, R. 3260; 383, R. 3292; 386, R. 3296). He is an alternate delegate from the State Society to the American Medical Association (R. 1302). Among the State Society committees which formulated recommendations relating to prepaid medical care and relationship with hospital associations on which Baum served were those on Medical Economics and on Contract Practice (R. 1303).

Baum was one of the incorporators of OPS (Gov. Ex. 5, R. 2091), and has been a director (R. 1309). Since the war he has been a member, and in 1948 the president, of a local OPS supervisory committee (Gov. Ex. 844, R. 4180; R. 1309). He has also been president and secretary of appellee Marion-Polk Counties Medical Society (R. 1302). Baum made a number of speeches before the local medical societies—one as recently as 1948 (R. 1318)—with respect to prepaid medical care and other State Society matters (Gov. Exs. 921, R. 4305; 1040, R. 4419; 1941, R. 5853–5854).[1] He appeared in 1947, on behalf of the medical society, before a committee of the State Legislature that was considering a

[1] He contended that such speeches had been made in his individual capacity and not as a representative of the State Society (R. 1304).

bill to outlaw many of the practices engaged in by appellees during this conspiracy (R. 1305–1306).

2. *Besson*

Besson has been a member of the State Society and the Multnomah County Society since 1911 (R. 1499). Prior to 1938, he had been engaged in contract practice with Industrial Hospital Association (R. 1500, 1502). In that year, however, he was called before the Multnomah Society Board of Censors because of such practice, and he gave up that work (Gov. Ex. 1958, R. 5959, 5962). By 1941, he was a member of the Grievance Committee (Gov. Ex. 202, R. 2551). He also served on the Board of Censors (R. 1504). In addition, Besson was a member of the Multnomah Society Council (Gov. Ex. 768, R. 4023), was a delegate from the Multnomah Society to the State Society in 1940 and 1941 (Gov. Ex. 281, R. 2916; 768, R. 4023; R. 1499), and has been president, vice-president, and a director of the Multnomah Society sponsored medical care plan (R. 1503). Beginning before 1940 (R. 1510), Besson has been "militant" in his attitude that doctors affiliated with the plan should not deal with the hospital associations—"we were in a competitive business with hospital associations"; he "preached" the idea that physicians dealing with the latter should be thrown out of the doctors' plan (R. 1505–1506).

Besson was a member of the State Society Council from 1941 to 1943 (Gov. Ex. 349, R. 3179; R. 1499). In the latter year, he was appointed chairman of a special committee of the Council to study and submit recommendations concerning (1) the relationship of members to commercial hospital associations, (2) railroad contract practice, and (3) the relations between OPS and the Oregon Blue Cross plan (Gov. Ex. 352–355, R. 3197–3202). This committee continued its study until 1944 (Gov. Ex. 355, R. 3201).

3. *Brennan*

This appellee has been a member of the State Society Council (Gov. Exs. 280, R. 2890; 295, R. 3018; R. 1605), of the House of Delegates (R. 1605), and of the Committee on Medical Education and Hospitals (Gov. Exs. 316, R. 3065; 328, R. 3103). In 1936, as a member of the Council, he participated in the adoption and distribution to the membership of the State Society of the policy statement concerning the enforcement of the Principles of Medical Ethics (Gov. Ex. 293, R. 3010), and signed the accompanying call against "state medicine" (Gov. Ex. 661, R. 3687). It was the policy statement of 1936 which listed "the activities of the commercial hospital associations" as among the causes "leading to the impoverishment of the physician," and urged that members of the local societies engaged in "unethical contract practice" be "requested to cease

such activities and to conduct themselves in accordance with the Principles of Medical Ethics" (Gov. Ex. 662, R. 3692, 3696). This policy statement and call marked the onset of the State Society's vigorous campaign against the hospital associations and other forms of contract practice. See Main Brief, pp. 29–32.

Brennan has served as a trustee of OPS since its formation (R. 1603), and has been a member of the Board of Directors since "shortly after its organization" (*ibid.*). He has attended all but two of the meetings of the Board since 1942 (R. 1605). He was vice president of OPS in 1942 (Gov. Ex. 388, R. 3303), 1945 (Gov. Ex. 419, R. 3365), 1946 (Gov. Ex. 500, R. 3545) and 1949 (Gov. Ex. 454, R. 3441), was a member of OPS' executive committee in 1945, 1946, and 1948–1949 (Gov. Exs. 421, R. 3370; 424, R. 3382; 454, R. 3440; 500, R. 3546), and was chairman of the OPS Public Relations Committee in 1945 and 1946 (Gov. Exs. 419, R. 3365; 425, R. 3387; 499, R. 3544).

4. *Fitzgibbon*

Appellee Fitzgibbon has been an active member of this conspiracy, both as an official of the State Society and as a leader of the campaign against the hospital associations. He described his own participation in the formulation of State Society policies respecting prepaid medical care and relations of the members with hospital associations as "the continual demand that the

ethical requirements be lived up to. * * * I have tried to see that the necessary restrictions have been placed upon the organization so that they would be kept in line from the professional standpoint and safeguard the patient ethically." (R. 1353.) However, as he interpreted the principles of medical ethics, "lay operated" hospital associations and their affiliated doctors did not meet these "ethical requirements" (R. 1353). He indicated that he had had an active part in "having the Society go after these violators of medical ethics" as "part of a general trend toward housecleaning" (*ibid.*).

Fitzgibbon has been a member of the State Society Council since 1935 (Gov. Ex. 1751, R. 5340; R. 1336). At a Council meeting early in 1936 (Gov. Ex. 292, R. 3007):

> Dr. Fitzgibbon stated that practices in violation of the Principles of Medical Ethics had sprung up in so many localities of the state that the problem of enforcement was clearly a matter for consideration and action by the state society and that the employment of legal counsel was a necessary step in taking sound action. * * * Dr. Fitzgibbon stated that the position of the Council concerning the widespread violations of the principles of medical ethics should be clarified and that a definite statement of policy should be formulated and sent to all the component societies.

Fitzgibbon was appointed to draft such a policy statement (Gov. Ex. 293, R. 3010), and the statement that the Council sent out to all members of the State Society with his approval was adopted almost verbatim from Fitzgibbon's draft (*ibid,* R. 3011–3014).

Among other significant actions by the Council in which Fitzgibbon participated were affirmance of the expulsion of two doctors for contract practice with Prudential, and adoption of a resolution against approving plans of hospital associations not owned and controlled by medical society members (*supra,* pp. 2–3).

Fitzgibbon's preeminent position in Oregon medical affairs is also seen in his designation as a delegate from the State Society to the American Medical Association from 1936 to 1944 (Gov. Ex. 1751, R. 5340).[2] He was a member of the State Society's Committee on Contract Practice during the critical year 1936 (Gov. Ex. 306, R. 3042), and of the Bureau of Medical Economics during its formative stage in 1939 (Gov. Ex. 335, R. 3120).

5. *Hunt*

Appellee Hunt is a specialist in obstetrics and gynecology (R. 1473), a field that the hospital association contracts had not covered until 1947 (R. 1475). His own personal lack of contact with the associations, however, has not inhibited

[2] He has been a trustee of AMA since 1945 (R. 1335).

him from taking an active part in the organized profession's campaign against them.

Hunt served as president of the State Society in 1940–1941 (R. 1474), was a member of the Council from 1936 to 1942, and of the Council's executive committee for a number of years (R. 1482). During the period he served on the Council, there was "a lot of talk, yes, about contract practice" (R. 1476). While he was president "every meeting those things came up and took a good deal of our time"; his year as president "was pretty much a year of discussing ethics, medical ethics" (*ibid*).

The actions participated in by Hunt as member of the Council included:

(1) Adoption of the policy statement on the enforcement of the Principles of Medical Ethics (*supra,* p. 5).

(2) Adoption of the resolution against approval of any prepaid medical care plan not owned or controlled by medical society members (*supra,* pp. 2–3).

(3) Adding to the Council's recommended policies for low-wage group medical care a provision that no local plan would be approved by the Bureau of Medical Economics if it included any doctors who participated in any prepaid medical care plan not approved by a component society and the State Society Council (Gov. Ex. 338, R. 3131).

During his term as president of the State Society, Hunt:

(1) Wrote to an officer of Industrial Hospital Association that the State Society "cannot approve competing organizations throughout the state even if they are physician owned" (Gov. Ex. 889, R. 4252).

(2) Stated in the president's letter to members of the State Society, which was published in Northwest Medicine, that "Any plans for medical care of the low-income patient should be solely in the hands of the medical profession" (Gov. Ex. 340, R. 3138).

Hunt was also active in appellee Lane County Medical Society. He was president in 1935 (Gov. Ex. 260, R. 2738), a member of its council for a number of years thereafter (Gov. Exs. 1002, R. 4385; 1015, R. 4395; 1019, R. 4397), and on various committees (Gov. Exs. 1022, R. 4400; 1026, R. 4403). In 1936, he told a meeting of the State Society Council that the Lane County Society was "attempting to work out a solution" to the problems of the "lay-owned associations" which was "planned" to include their "elimination" and "obtaining the cooperation of the hospitals in refusing to provide service to the patients of lay-owned hospital associations" (Gov. Ex. 702, R. 3869). Hunt apparently was so anxious to see the boycott successful in Lane County that he joined with other Lane County doctors in informing Industrial (Gov. Ex. 2069,

R. 6394), National (Gov. Ex. 1411, R. 5004), and Prudential (Gov. Ex. 855, R. 4206), in November 1937, that after January 1, 1938, he would be "unable to care for any patients covered by contract of your association," even though at that time his specialty was not covered by the contracts of those associations and he had never had occasion to deal with them (R. 1473, 1475).

6. *Leitch*

Appellee Leitch has been active in the affairs of both the State Society and Multnomah County Society. State Society committees on which he has served include Public Policy (Gov. Exs. 351, R. 3197; 383, R. 3293), New Business (Gov. Ex. 1751, R. 5343), Railroad Contract Practice and Relations with Northwest Hospital Service Plan (*ibid.*), and Special Study of OPS (Gov. Ex. 423, R. 3380). Among the Multnomah County Society Committees on which he has been have been Public Relations (Gov. Ex. 1751, R. 5343) and Public Policy (Gov. Ex. 201, R. 2550). He was a delegate from the Multnomah Society to the State Society House of Delegates from 1945 to 1948 (Gov. Exs. 283, R. 2931; 287, R. 2948; 1751, R. 5343).

Leitch has been a director and trustee of OPS since 1944 (R. 1536–1537), and a member of various OPS committees (e. g., Gov. Exs. 359, R. 3210; 721, R. 3922). He served as editor of the Oregon section of Northwest Medicine from 1944 to 1949 (Gov. Ex. 1751, R. 5343) during a

period when a number of articles were published in which contract practice was strongly attacked.

Around 1940, Leitch suggested at a meeting with the manager of National Hospital Association that the association should "turn over" its business to OPS (R. 579). Leitch stated that he was not "personally interested," but that "in the interest of the medical profession generally he thought it would be a good thing if we weren't in the picture, that we were lay people, and *therefore this should be in the hands of the medical doctors*" (*ibid.*; italics added). On another occasion, Leitch stated at an OPS directors' meeting that he would like to see OPS have a monopoly (R. 1678).[3]

7. *Martzloff*

Martzloff was president of the State Society in 1941, and a member of the State Society Council and its executive committee from 1936 to 1942 (Gov. Ex. 1751, R. 5344–5345). He was alternate delegate to the American Medical Association in 1938, 1939, and 1946–48, a member of the Board of Trustees of Northwest Medicine from 1936 to 1948, a member of the Committee on Publications from 1936 to 1948, and also on other committees (*ibid.*). He was similarly active in the affairs of the Multnomah County Society, having served as vice president in 1937–1938, and on the Committee on Public Policy from 1942 to 1946 (*ibid.*).

[3] Leitch, called as appellees' witness, did not deny making either of these statements.

Martzloff was chairman of the Multnomah Society Committee that prepared the well-known Martzloff Report (Gov. Ex. 208, R. 2564). It was this report, adopted by the Society, which criticized the Multnomah doctors' plan for failing adequately to limit the income level of subscribers, and pointed out that the plan's operations "have had no appreciable effect on the proprietary hospital associations" (Gov. Ex. 209, R. 2569–2570). See Main Brief, pp. 25–29.

Disciplinary proceedings against doctors engaged in hospital association practice were instituted by the Multnomah Society soon after adoption of the Martzloff Report. Martzloff was named chairman of the Society's Grievance Committee, appointed in July 1936 to "Investigate any alleged unethical conduct of any member" and to "Make and file any written charges against any member of this Society as is called for by the by-laws" (Gov. Ex. 728, R. 3937). By 1938, Martzloff had become a member of the Society's Board of Censors (Gov. Ex. 1751, R. 5345). Both the Grievance Committee and the Board of Censors played a prominent part during the period Martzloff served on them in carrying out the conspiracy through the conduct of disciplinary proceedings. See Main Brief, pp. 41–51.

8. *McLean*

McLean admits that he has been "very active" in medical society affairs (R. 1115), and "probably" had "some part" in framing the policies

of the State Society (R. 1117). He was president of the State Society in 1945 after having been first vice president and president-elect, respectively, in the two preceding years (Gov. Ex. 1751, R. 5342). McLean was a member of the State Society Council from 1941 to 1949 (*ibid.*), and has participated in discussions concerning prepaid medical care whenever they have come up before the Council (R. 1117). He was a delegate from the State Society to the American Medical Association in 1946 (R. 1116), a member of the Committee on Publications for a number of years, and from 1943 to 1949 one of the three trustees on Blue Cross nominated by the State Society (Gov. Ex. 1751, R. 5342). From 1938 to 1949 he served on the Board of Trustees of Northwest Medicine (*ibid.*).

In 1938, McLean and his office associate announced, in a letter written to Clackamas County employers, that since the doctors, organized as the Association of Clackamas County Physicians, were "prepared to furnish everything you have had in the past, and more than can be obtained in the future through any outside source", "*we will not be available for your care directly or indirectly while you are under contract with any association other than our own*" (Gov. Ex. 1433, R. 5023, italics added). All but one or two doctors in Clackamas County belonged to the doctors' association (Fdg. 51, R. 2029; R. 1114).

At the March 2, 1948, meeting of the Yamhill County Medical Society, McLean, as a guest speaker, "presented the experiences of the Association of Clackamas County Physicians in their struggle with and against prepaid insurance groups" (Gov. Ex. 1941, R. 5858–5859).

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